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No. 90-38

Supreme Court, U.S.
FILED
AUG 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS
PETITIONERS

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; AND ALL OTHER SIMILARLY SITUATED COUNTIES AND CITIES
RESPONDENTS

CITY OF FAYETTEVILLE, ARKANSAS
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

REPLY BRIEF OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION

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The Petitioners will address separately below the major points raised by Respondent Pledger, Commissioner of Revenues, in his Brief in Opposition.

1. Cable television is entitled to claim the First Amendment guaranteed protections of free speech and free press.

The Respondent argues (Resp. Br. 3-4) that cable television operations are *not* covered by the First

Amendment's guaranteed right of *free press*, and that the heightened scrutiny (and resulting shift of the burden of proof) applied by the legal analysis in any case where a fundamental right is involved applies *only* to the "collective body of printed publications." Such a myopic view of what constitutes similarly situated businesses for First Amendment evaluation purposes was clearly rejected by this Court in its decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). There, the Court discussed and analogized the attributes of cable television operations and found that they were similar to those of other print and broadcast businesses, as well as certain First Amendment attributes of individual speakers. 476 U.S. at 494-495.

The evidentiary record in this case establishes that cable television is an integral, though separately identifiable, part of the mass communications media that is composed of numerous businesses engaged in *both* the electronic and print transmission of news, information and entertainment. The Oklahoma Supreme Court recently addressed this very issue and rejected the taxing agency's argument for a narrow application of this Court's First Amendment based test for state taxes. The Oklahoma Court recognized that *all* segments of the mass communications media are entitled to the same First Amendment protected rights of *free press* and *free speech* in its decision in *Oklahoma Broadcasters Association, Inc. v. Oklahoma Tax Commission*, 789 P.2d 1312, 1316 (Okla., 1990), where it held:

> Both *Minneapolis Star* and *Ragland* found *First Amendment* violations resulting from a differential tax scheme between different members of the press. Though both *cases* admittedly dealt with differential treatment among members of the *print* media, there is nothing to suggest that this court should, without sufficient justification, approve preferential treatment of the print media over the broadcast

media, where both are members of the press. The First Amendment guarantees freedom of the press -not just the *printed* press.

Thus, the Petitioners submit that the Respondent state tax administrator's argument that cable television is *not* entitled to claim the historic First Amendment guaranteed rights of *free press* and *free speech* should be rejected by this Court.

2. The raising of general revenue is not a sufficiently compelling reason to justify the discriminatory imposition of Arkansas' state and local Sales Tax on cable television services.

The Respondent argues here (Resp. Br. 4-7), as did his successor in office in *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987), that the raising of general revenues is "an interest which is *critical* to any government," and is therefore an interest that is sufficient to overcome the incidental burdens imposed upon the Petitioners' First Amendment rights by the discriminatory application of Arkansas' otherwise general Sales Taxes. The Respondent therefore argues that he has satisfied this Court's four part balancing of interest test that was adopted by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968).[1] The Respondent also indulges in what the Petitioners submit is a baseless semantic gyration by arguing that there is a difference between a *compelling* interest and an *important* or *substantial* interest, under this Court's four part balancing of interest test enunciated in *O'Brien*. There is no gradation of value between the use of

[1]The only reason given by the Arkansas General Assembly for imposing these state and local Sales Taxes upon cable television services through the enactment of Act 188 of 1987 is found in § 3 of that Act (Appendix G, p. 28a-29a). There, the Legislature stated the Act was passed "to avoid a substantial reduction in State revenues." This Court *specifically* considered and rejected this argument in both the *Minneapolis Star* and *Arkansas Writer's Project* cases by the tax administrators.

these words, as this Court specifically noted in *O'Brien*, 391 U.S. at 376-377:

> This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. *Whatever imprecision inheres in these terms*, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (Footnotes Omitted and Emphasis Added)

Thus, this Court places no special designation on the use of the word *compelling*, as opposed to *important* or *substantial*, in the implementation of this balancing of interests test.[2]

Though the Petitioners acknowledge that the raising of revenues is an interest that *is* critical to the operation of government, they submit that the raising of revenues by the discriminatory imposition of an otherwise general Sales

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[2]In fact, in the decision in *Minneapolis Star v. Minnesota Commissioner of Revenues*, 460 U.S. 575, 586 (1983), this Court liabled the interest that the government must establish in applying the *O'Brien* "balancing of interests" test to be "a counterbalancing interest of *compelling* importance that it cannot achieve without differential taxation." This Court went on to explicitly hold that the mere raising of general revenues was not sufficient to "justify the special treatment of the press."

Tax upon similarly situated First Amendment protected businesses engaged in the mass communications media is *not* a governmental interest that is sufficient to satisfy this Court's *O'Brien* test, as was held by the Arkansas Supreme Court in its decision in this case (Appendix B, pp. 6a-8a).

> **3. The fact that cable television makes a somewhat greater use of the public rights-of-way, than do other businesses involved in the mass communications media, does not justify the discriminatory imposition of the state and local Sales Taxes as the Respondent asserts.**

The Respondent argues (Resp. Br. 7-9) that the delivery of cable television service through the use of the public rights-of-way is a factor that distinguishes cable television from all other segments of the mass communications media and, because of this reason alone, makes cable television so unique that the discriminatory imposition of Arkansas' Sales Tax is justifiable. This argument by the Respondent was specifically rejected by the Arkansas Supreme Court (Appendix B, p. 5a), because cable television pays franchise fees to cover the "rental" of its use of the public rights-of-way. This Court should reject this argument for the same reasons.

It must be noted that even though the Respondent admits that there is a direct conflict between the decision of the Arkansas Supreme Court in this case, and the decisions of the Oklahoma Supreme Court in the *Oklahoma Broadcasters Association* case, *supra*, and the New York Court of Appeals in the case of *McGraw-Hill v. State Tax Commission*, 541 N.Y.S.2d 252 (App. Div. 3 Dept., 1989),

affirmed and adopted, 252 N.E.2d 163 (N.Y., 1990)[3] in applying the rationale or test of this Court's *Minneapolis Star* decision to similarly situated businesses involved in both the electronic and print segments of the mass communications media, he simply argues that the Oklahoma and New York courts "have gone too far in attempting to construe *Minneapolis Star* . . . ." The Petitioners submit that the converse of this argument is the one that should be adopted by this Court after a hearing on the merits, i.e. the Arkansas Supreme Court's *narrow* interpretation of the *Minneapolis Star* test has *not* gone far enough.

Petitioners submit that this Court should grant their Petition for Certiorari to decide the important First Amendment questions presented in this case for the benefit of businesses involved in the print and electronic segments of the mass communications media and the state taxing authorities throughout the country. A decision by this Court on this issue will eliminate the constitutionally approved difference that now exists in reality in the imposition of a sales (excise) tax upon the proceeds realized from the sale of cable television services to subscribers in Fort Smith, Arkansas (which sales are subjected to sales (excise) tax under the *Medlock* decision in this case) and in

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[3]In responding to the state's argument that businesses involved in the electronic and print segments of the mass communications media are not "similarly situated," because they have different First Amendment rights, the New York Appellate Court held (541 N.Y.S.2d at 255):

> Given that there was a differential treatment between the print media and the broadcast media in this case, it was incumbent upon respondent to show that 20 NYCRR 4-4.3(f)(2) was necessary to serve a compelling State interest (*see, id.*). This, in our view, it did not do. Respondent claims that the unique nature of the electronic media makes it more susceptible to governmental regulation and that there are many differences between the print and visual media. While that may be true, such an argument fails to show any compelling State interest in taxing the two types of media differently. Thus, the regulation must fall.

the sales of the same cable television services in Poteau, Oklahoma (located just across the state line) (which sales would not be subjected to such sales (excise) taxes under the rationale of the *Oklahoma Broadcasters* decision). The Petitioners believe that all citizens of the United States should have their First Amendment rights of free speech and free press protected in the same manner with regard to the taxation of the purchase of cable television services, no matter in what state they reside.

4. The Petitioners' equal protection arguments have been subordinated to their First Amendment based arguments in this appeal.

In his Brief in Opposition (Resp. Br. 9-12), the Respondent alleges[4] that Petitioners have argued a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution in their Petition. Though the Petitioners raised an equal protection clause argument in their complaint in the trial court, their Petition for Certiorari in this appeal is based strictly upon their claim to the First Amendment rights of free speech and free press.[5]

Even if this Court should consider the proper basis of the Petitioners' claim in this case to be an equal protection based claim, rather than a First Amendment based claim, the Petitioners submit that the "heightened scrutiny" test that is applicable to a fundamental right (e.g. the right of

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[4]This argument is asserted by the Respondent tax administrator without making any reference whatsoever to the Petitioners' Petition for Certiorari. Petitioners submit that they have *not* directly raised a Fourteenth Amendment equal protection based claim in their Petition.

[5]This Court, in its *Minneapolis Star* decision, specifically held that the cause of action of the complaining taxpayer was being decided on First Amendment, not equal protection Fourteenth Amendment, based grounds. 460 U.S. at 587, ftnt. 7.

free speech or free press guaranteed by the First Amendment) would apply in this case in applying the equal protection clause, not the "rational basis" test suggested by the Respondent. Thus, the analysis that was utilized by the Illinois Appellate Court in *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988), in applying this Court's *Minneapolis Star* test to a challenged tax, would be the applicable one to use in this appeal, as opposed to the traditional "rational basis" test that this Court applied in the decision in the *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959).[6]

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[6]The Respondent's citation to the Arkansas Supreme Court's decision in the case of *Streight v. Ragland*, 655 S.W. 459 (1983), is inappropriate in this setting, inasmuch as that decision has absolutely no value as a precedent to this Court's consideration of the issues presented.

CONCLUSION

For reasons set forth above, the Petitioners submit that their Petition for Certiorari to the Arkansas Supreme Court should be granted so that this Court may settle a real conflict that presently exists between the highest appellate courts of several of the various states regarding this important question of the constitutionality of state taxes as the issue applies to businesses involved in both the electronic and print segments of the mass communications media.

Respectfully submitted,

August 13, 1990

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